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## REVIEWS AND CRITICISMS

ADOLF MERKEL. *DIE LEHRE VON VERBRECHEN UND STRAFE*. Edited by M. Liepmann. F. Enke, Stuttgart, 1912. Pp. XLII+371.

This book takes the place of the second edition of the late A. Merkel's Textbook of Criminal Law, which is out of print for some time. The title of the original book is a trifle misleading, since it is not so much a textbook to be used by the student in connection with a lecture course, as a critique of the fundamental notions of criminal law. The existing German law is taken as a context for developing a general doctrine of crime and punishment. Merkel's views have made themselves felt very widely, particularly by the change of front in regard to some vital points in the doctrine of Liszt's school. The larger part of the program of reforms advocated by Liszt—individual treatment of the criminals, importance of studying the causes and conditions of crime, necessity to combine educational preventive measures with imprisonment—are more or less generally recognized by criminologists, but this does not mean a victory of their theoretical basis. Two propositions may be regarded as essential for an idealistic conception of criminal law: first that criminal responsibility cannot exist without freedom of the will, and second that punishment has an absolute value of its own without reference to its useful effects for the future. Anthropology and sociology teach us to regard crime as a necessary result of existing conditions, wherein anthropology naturally emphasizes the necessity of reactions for a given character, while sociology accentuates the influence of existing social conditions on forming a character and provoking responses from it. Both sciences have made us familiar with the idea that will actions are causally determined, and the question arises whether we also have to accept their views in regard to crime and its punishment. On the point of free will, Merkel takes exceptions with both doctrines: against the idealistic school he insists that legal and criminal responsibility do not rest on free will, while he opposes the sociological and anthropological doctrines on account of the consequences they draw from the deterministic view in regard to crime and punishment.

The sociological and anthropological doctrines of crime and punishment are very much alike. They agree in their opposition against punishment as retaliation. Indeed, logically we can punish an action only if it could have been avoided, *i. e.*, if the person could have acted otherwise. Without free will, therefore, apparently no guilt, and without guilt no punishment. Determinism seems to take away from punishment every function except that of frightening off future criminals, a view which past experience has proved to be thoroughly unacceptable. Both doctrines insist that an action must not be judged isolated from the criminal, his antecedents, and his surroundings, but that the real danger for society lies in his character and what may be expected from it for the future. This is the point of Merkel's attack. He shows that the distinction between punishment as a retributive measure and punishment for a purpose is artificial and unsatisfactory. History shows that punishment always had the purpose of maintaining an existing order and that the amount of punishment reflected the im-

portance which public opinion attached to the maintenance of this order and its disturbances. As government increases in its power, punishment ceases to be a personal reaction against pain inflicted and is meted out according to fixed laws. Punishment certainly has not the purpose to defend or establish an absolute moral law, as is seen from the considerations of public welfare, which frequently decide the amount of punishment given. Punishment refers to a past deed, but not in so far as it belongs to the past, but because it is an element affecting the present and the future by its consequences. Not the fact that somebody at some time in the past has fallen sick is the cause of medical treatment, but the actually existing conditions and the dangers arising from them call for the interference of the physician. Similarly it is bootless to ask whether we punish "quia peccatum est" or "ne peccetur."

To make the dangerous character of a criminal the object of punishment means the destruction of our present legal system. The criminal could not be punished any more than the lunatic. There would be no sense—not even that of frightening off possible wrongdoers in the future—in punishing a person who has become guilty through a combination of circumstances which never will arise again, if his reaction does not prove any dangerous tendencies within him. On the other hand, we would have to take preventive measures against individuals whom we recognize as dangerous, although they may not yet have committed any crimes. For the sociological and anthropological view the actual offense is nothing more than a symptom of the dangerous character of the individual, or a proof of his need for improvement. Punishment, for such a view, is a method of treating, or an experiment in removing certain anti-social qualities. The law could not threaten certain crimes with specified terms of imprisonment of given length, since there is no way of predicting when the cure will have taken effect, and since there obviously will be large individual variations. The person to judge the moral improvement of the criminal would have to be some prison official, on whom must devolve the duty to pass the final word on releasing the prisoner.

This double opposition of Merkel against the idealistic school of criminal law, and against the sociological and anthropological doctrines of criminology makes Merkel's book very delightful reading. The argumentation is subtle, but can be followed by a reader who does not profess to have any knowledge of the German criminal code.

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F. M. URBAN.

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PROSTITUTION IN EUROPE. By *Flexner Abraham*, The Century Company, 1914, New York. Pp. IX + 455, \$1.30.

This is the second volume of a series of four announced by the Bureau of Social Hygiene of New York City. The first was by Geo. J. Kneeland, on Commercialized Prostitution in New York City.

To get the material, Mr. Flexner spent a year in Europe and spent a second year getting it in shape. Practically every large city from